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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL.,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF HAWAII, ARKANSAS, IDAHO, NEBRASKA, NEVADA, OHIO, AND TENNESSEE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Through the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (hereinafter ADA or the Act), Congress has "obliterat[ed] the Framers' carefully crafted balance of power between the States and the National Government." *United States* v. *Morrison*, 120 S. Ct. 1740, 1755 (2000) (citation omitted). It is for this reason that the States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee urge the Court to reverse the judgment below. In so doing, they join the State of Alabama in this case and at least two other States that have independently requested that the Court protect the immunity of the States from suit under the ADA. *See Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. pending* (No. 99-424); *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. pending* (No. 99-1417).

The issue presented is whether Congress has the power under Section Five of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity to impose liability under the ADA against States for suits brought by private citizens in federal courts. The constitutional rights of the States are being violated by the ADA. The ADA has in effect relegated States to the status of governmental provinces in our federal system of government on matters pertaining to discrimination against the disabled, and it has done so without any justification in the form of prior misconduct by the States, and without any tailoring of the federal remedy to the scope of supposed State misconduct. The broad sweep of the ADA reaches into all State programs and services, including those most sensitive to the States, affecting prisons and hospitals, delivery of medical insurance to the poor under Medicaid laws, and quarantine systems designed to protect a State from the importation of rabies. Under the limited defenses provided by the ADA, neither a rational basis nor even a compelling state interest generally suffices to protect a State from liability. Nor is a State's good faith, nor even its motivation to protect the disabled, a defense to monetary

damage claims under the ADA. By its terms, and as interpreted by the federal courts, none of these "defenses" is available to the States.

Amici share with all States an interest in protecting their sovereignty from such unwarranted intrusion by Congress. The States "are not relegated to the role of mere provinces or political corporations but retain the dignity . . . of sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). This sovereignty requires that States may not, without their consent, be subject to private suit in federal court except where Congress acts pursuant to a grant of valid authority under the Constitution. *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631 (2000).

In the last several Terms, this Court has four times considered whether a statute was enacted by Congress pursuant to a grant of power under the Fourteenth Amendment sufficient to abrogate the States' Eleventh Amendment immunity. In each of those cases, this Court concluded that Congress had inappropriately sought to redefine the substance of the constitutional right at issue, rather than validly seeking to enforce or prevent violations of the Fourteenth Amendment. *See Kimel*, 120 S. Ct. 631; *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank,* 527 U.S. 627 (1999); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In addition to providing powerful precedent for why applying the ADA to the States in federal court exceeds Congress' authority, this recent history also exhibits that the States must remain ever vigilant to guard against encroachment by the Federal Government of their sovereign power.

In filing this brief, *Amici* do not seek to limit the ability of the disabled to protect their rights. To the contrary, the States have long been at the forefront of efforts to prohibit discrimination against the disabled and to eliminate barriers to their full participation in society. Any State may consent to be sued in federal court for enforcement of the ADA. But our

federalist design requires that the States, and not the Federal Government, be the arbiters of when that consent will be given.

SUMMARY OF ARGUMENT

Last Term, in *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), this Court held that Congress lacked the power under Section Five of the Fourteenth Amendment to impose liability against unconsenting States in federal court for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). In *Kimel*, this Court held that the ADEA "prohibits very little conduct likely to be held unconstitutional," and was based on a legislative record in which "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 120 S. Ct. at 648, 649. The parallels between the ADA, at issue here, and the ADEA are striking, and lead to the conclusion that in enacting the ADA, Congress similarly lacked the power under the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the States.

When it considered the ADA, Congress did not have before it evidence of a pervasive pattern of violations by the States of the constitutional rights of the disabled. While Congress identified a record of wide-spread discrimination against the disabled in society generally, it failed to find a pattern of conduct by the States in violation of the rights of their disabled residents, no less find any such violations that would amount to a constitutional violation. To the contrary, States have historically protected the interests of the disabled through the provisions of state law, and Congress looked to what had been done by the States as examples of steps that could be taken to better integrate the disabled into society. In addition, the provisions of the ADA cannot be understood as designed to remedy or prevent violations of the constitutional rights of the disabled because the provisions of the ADA are well out of proportion to the rights of the disabled as protected by the Fourteenth Amendment. In *City of Cleburne* v.

Cleburne Living Center, Inc., 473 U.S. 432 (1985), this Court held that distinctions drawn by the States on the basis of disability are afforded only rational basis review under the Fourteenth Amendment, a holding that was affirmed by the Court in *Heller* v. *Doe*, 509 U.S. 312 (1993). In contrast to review under the rational basis test, which presumes governmental classifications to be lawful and accepts a rational explanation by the State for classifications on the basis of disability, the ADA prohibits a much broader swath of conduct by the States. The legislative history confirms that Congress, through the ADA, was attempting precisely to increase the level of scrutiny given to classifications concerning the disabled as compared to that applied under the Equal Protection Clause. In sum, the ADA, like the ADEA and the Religious Freedom Restoration Act previously considered by this Court, "is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 120 S. Ct. at 647 (quoting *City of Boerne*, 521 U.S. at 532).

Amici have far more than an academic interest in these matters. Litigation brought under the ADA against the States provides concrete evidence of the lack of congruence and proportionality between the requirements of the ADA and the strictures of the Equal Protection Clause. These cases exhibit how the ADA requires States to defend themselves in federal court, and sometimes to pay damages awards, where laws or practices of general applicability have an incidental effect on the disabled. Under the ADA, States have been held liable for their very attempts to comply with the Act. States would not be held liable – or likely even face litigation – for such conduct under the Equal Protection Clause. The United States does not face the threat of compensatory damages for its discrimination against the disabled because the ADA does not apply to the federal government, *see* 42 U.S.C. § 12111(5)(B), 42 U.S.C. § 12131, and the Rehabilitation Act, which prohibits discrimination against the disabled by the federal government, does not authorize awards of com-

pensatory damages in actions against the United States. *Lane* v. *Pena*, 518 U.S. 187 (1996).

The interest of *Amici* in protecting their sovereignty, however, should not be mistaken for an interest in limiting the rights of their disabled residents. To the contrary, *Amici* intend to continue their efforts to ensure that the disabled are not discriminated against and are able to participate fully in society. Through state law protections, and through the ADA where States consent to private suit in federal court, the interests of the disabled will continue to be protected from unwarranted discrimination by the States even were this Court to conclude – as it should – that in enacting the ADA, Congress lacked the power under the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS SUITS UNDER THE ADA BY PRIVATE CITIZENS IN FEDERAL COURT AGAINST NON-CONSENTING STATES

Although the Constitution provides the Federal Government with broad powers over areas within its competence, it also specifically "recognizes the States as sovereign entities." *Alden* v. *Maine*, 527 U.S. at 517 (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996)). The immunity of non-consenting States from suit by private citizens in federal court – reflected in the Eleventh Amendment to the Constitution – is central to the sovereignty retained by the States.[1] "[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over

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[1] The Eleventh Amendment to the Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

suits against nonconsenting States." *Kimel*, 120 S. Ct. at 640 (citing *College Sav. Bank*, 527 U.S. at 713; *Seminole Tribe*, 517 U.S. at 54; *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890)). For Congress to abrogate the States' Eleventh Amendment immunity it must make its intent to abrogate unambiguous in the text of the statute itself,[2] and must act pursuant to a valid grant of constitutional authority. *Kimel*, 120 S. Ct. at 640.

In enacting the ADA, Congress expressly relied on its power under the Fourteenth Amendment. *See* 42 U.S.C. § 12101(b)(4).[3] While the affirmative grant of power to Congress contained in the Fourteenth Amendment provides Congress with the power to abrogate the Eleventh Amendment immunity of the States, that power is not unlimited. *Kimel*, 120 S. Ct. at 644. Congress retains the power to enforce the provisions of the Fourteenth Amendment, but lacks the power to decree the substance of those provisions. *Id.* (citing *City of Boerne*, 521 U.S. at 519). Legislation that properly enforces the Fourteenth Amendment rather than redefining its substance exhibits "'a congruence and proportionality between the injury to be prevented or remedied and

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[2] The ADA contains an unambiguous expression by Congress of an intent to abrogate the States' immunity. *See* 42 U.S.C. § 12202.

[3] The Fourteenth Amendment to the Constitution provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

In applying the congruence and proportionality test, two areas of inquiry have emerged. The first is whether the record developed by Congress contains evidence of unconstitutional conduct purportedly targeted by the legislation. Where there is no more than "anecdotal evidence" that does not reveal a "widespread pattern" of constitutional violations across the country, the legislative record does not support a conclusion that Congress was acting prophylactically to remedy or avoid constitutional violations. *City of Boerne*, 521 U.S. at 531. In order to support abrogation of the States' Eleventh Amendment immunity, moreover, the legislative record must manifest more than just a general problem in society at large, it must contain evidence of constitutional violations of the right at issue *by the States*. *Florida Prepaid*, 527 U.S. at 640.

The second inquiry is whether the legislation at issue is proportional to a supposed remedial or preventive purpose. Relevant to this inquiry is the likelihood that the conduct by the States prohibited by the legislation in question would be found to violate the applicable constitutional standard. Thus in *City of Boerne*, this Court held that the Religious Freedom Restoration Act ("RFRA") was not proportional remedial legislation because the compelling state interest test RFRA imposed was likely to displace many state laws that would survive the governing standard developed by this Court. *City of Boerne*, 521 U.S. at 532-34. In *Kimel*, this Court held that the ADEA was not a proportional response to any conceivable constitutional problem because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647; *see Florida Prepaid* 527 U.S. at 646-47; *College Sav. Bank*, 527 U.S. at 672-74.

Applying the congruence and proportionality test to the ADA leads to the same conclusion reached by this Court in

City of Boerne, *Kimel*, *Florida Prepaid*, and *College Savings Bank*. The ADA is not congruent or proportional to any purported constitutional violations by the States of the rights of the disabled. Congress enacted the ADA without evidence of any unconstitutional discrimination by the States against the disabled, no less a widespread pattern of such violations. The ADA is also disproportionate because it prohibits substantially more State conduct concerning the disabled than would likely be held unconstitutional under the applicable equal protection, rational basis standard. In fact, the legislative history of the ADA shows that Congress expressly intended to heighten the level of scrutiny provided to decisions concerning the disabled above that required by the Constitution.

A. The Legislative History of the ADA Provides No Evidence of a Pattern of Misconduct by the States In Violation of the Constitutional Rights of the Disabled

The ADA resulted from extensive factual findings by Congress. The text of the ADA itself begins with "Congressional Findings and Purposes," in which Congress makes nine different findings concerning the discrimination, isolation, and segregation faced by the disabled. 42 U.S.C. § 12101. Not one of these findings, however, so much as mentions any misconduct by the States concerning their disabled residents, nor identifies any conduct that rises to the level of violating the constitutional rights of the disabled.

The impressive legislative record gathered by Congress in enacting the ADA also fails to identify the States' treatment of the disabled as an area of concern. In the many committee hearings, reports, and debates concerning the ADA, Congress did not focus on the conduct of States, but instead found that the disabled faced discrimination, prejudicial treatment, and barriers to full participation in society generally.[4] Congress

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[4] *See generally* House Comm. on Ed. and Labor, 101st Cong. 2nd Sess., *Legislative History of Public Law No. 101-336, The*

did not, however, "identif[y] any pattern of [disability] discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 120 S. Ct. at 649.

Even with regard to the sections of the ADA most closely related to conduct by the States, the legislative record fails to reflect evidence of discriminatory – no less unconstitutional – conduct by the States concerning the disabled. Congress explained that Title II.A of the ADA, 42 U.S.C. §§ 12131-34 – which prohibits discrimination in the delivery of public services by State and local governments – was an extension of the non-discrimination provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, which prohibits discrimination against the disabled by entities receiving federal funds. Congress noted that Title II.A was necessary because "[t]he resulting inconsistent treatment of people with disabilities by different State or local governmental agencies is both inequitable and illogical."[5] But in making this observation,

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Americans With Disabilities Act (Comm. Print 1990) (hereinafter "*Comm. Print*"). This Committee Print is a compilation of documents pertaining to the legislative history of the ADA.

In considering the ADA, Congress was presented evidence of general differential treatment of the disabled in areas in which States do not have a primary, or leading, role such as: transportation, *see, e.g.*, *Comm. Print* at 144-55, 170-74 (S. Rep. No. 101-116) (Comm. on Labor and Human Resources), 234-52 (H. Rep. No. 101-485, Part 1) (Comm. on Pub. Works and Transportation); public accommodations and services offered by private entities, *see, e.g.*, *id.* at 156-70 (S. Rep. No. 101-116), 307-10 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor); telecommunications, *see, e.g.*, *id.* at 175-81 (S. Rep. No. 101-116), 561-64, 599-603 (H. Rep. No. 101-485, Part 4) (Comm. on Energy and Commerce); and employment, *see, e.g.*, *id.* at 122-42 (S. Rep. No. 101-116), 327-56 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor), 471-89 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary).

[5] *Comm. Print* at 310 (H. Rep. No. 101-485, Part 1) (Comm. on Ed. and Labor); *see id.* at 110 (S. Rep. No. 101-116) (noting that

Congress did not identify any such inconsistent treatment by different governmental entities, nor did it identify any pattern of State conduct in violation of the protections contained in the Rehabilitation Act. Indeed, the Rehabilitation Act was repeatedly cited by supporters of the ADA as a model for the ADA itself.[6]

The legislative history concerning the enactment of the portion of the ADA that purports to abrogate the States' Eleventh Amendment immunity, 42 U.S.C. § 12202, is similarly silent concerning any pattern of illegal or unconstitutional conduct by the States. The legislative record concerning this provision simply recites that it was "included in order to comply with the standards for covering states set forth in *Atascadero State Hospital* v. *Scanlon* [473 U.S. 234 (1985)]."[7] Congress identified no evidence of State conduct making such abrogation necessary.

To the extent that States are mentioned at all in the legislative record, they are generally held up as positive examples for actions they had already taken to protect the rights of the disabled. Witnesses testified before Congress that virtually every State had enacted some form of legislation protecting the disabled from discrimination,[8] and provided details

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"[w]itnesses testified about the inequity of limiting protection based on the receipt of Federal funding.").

[6] *See, e.g.*, *Comm. Print* at 490-91 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary); 625 (May 17, 1990 floor remarks of Rep. Weiss).

[7] *Comm. Print* at 184 (S. Rep. No. 101-116); 411 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor).

[8] *See Comm. Print* at 190 (S. Rep. No. 101-116) ("All states currently mandate accessibility in newly constructed state-owned public buildings . . . "); *id.* at 194 (S. Rep. No. 101-116, views of Sen. Hatch) (referring to the "growing array of programs and antidiscrimination provisions at the local [and] state . . . levels"); *id.* at 2179 (testimony of Robert L. Burgdorf, Jr.) ("A number of states have passed legislation mandating accessibility in their park

concerning the efforts of individual States on behalf of their disabled residents.[9]

The legislative history further lacks any substantial discussion of the constitutional rights of the disabled and whether the States were violating those rights. There is virtually nothing in the legislative history concerning the requirements of the Constitution. The issue was not addressed even by those witnesses who would presumably be most knowledgeable about it.[10] It appears that only one witness even mentioned the governing law from this Court concerning the constitutional rights of the disabled. That law was mentioned, however, not as evidence that the States had frequently violated the relevant constitutional standard, but rather to argue that the Equal Protection Clause failed, in the witness' view, to adequately protect the rights of the disabled. As this witness noted, the Court has:

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and recreation facilities."); *see also* Appendix A hereto (listing current state laws).

[9] *See, e.g., Comm. Print* at 623 (remarks of Rep. Unsoeld concerning Washington); *id.* at 1046-61 (testimony of Massachusetts officials); *id.* at 1552 (testimony of EEOC Commissioner Kemp concerning North Carolina and Oregon); *id.* at 2845 (testimony of James Gashel concerning California); *To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability: Hearings on S. 933 before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 75-85 (hereinafter "*Hearings on S. 933*") (statement of Illinois Attorney General Neil Hartigan).

[10] *See, e.g., Hearings on S. 933* at 38-40, 299-337, 427-39 (testimony and statement of Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund); *id.* at 75-85, 487-93 (testimony and statement of N. Hartigan); *id.* at 169-71, 753-73 (testimony and statement of Tim Cook, Executive Dir. of the National Disability Action Center); *id.* at 195-214, 808-20, 829-46 (testimony and statements of Attorney General Thornburgh); *id.* at 590-611 (statement of American Civil Liberties Union).

> consigned cases involving disability discrimination to the level or 'tier' of judicial scrutiny least favorable to the individual who suffers the discrimination – the so-called 'rational basis' test. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). What this means in practical terms is that any halfway plausible rationalization for governmental discrimination against people with mental or physical disabilities will be enough to satisfy the Federal courts.[11]

Far from providing evidence of a pattern of violations of the constitutional rights of the disabled, this statement merely reinforces that through the ADA Congress sought to redefine the level of protection provided to the disabled pursuant to the Equal Protection Clause.

A review of the ADA's legislative record thus reveals that Congress "had virtually no reason to believe that State . . . governments were unconstitutionally discriminating" against their citizens on the basis of disability, *Kimel*, 120 S. Ct. at 650, and fails to support any notion that in enacting the ADA, Congress was addressing a nationwide problem of discrimination by the States against the disabled.

B. Because the ADA Imposes a Significantly Higher Burden on the States than Does Rational Basis Scrutiny, the Provisions of the ADA Cannot Be Understood as a Response to, or as a Means to Prevent, Unconstitutional Discrimination Against the Disabled

In addition to being based on a legislative record that lacks evidence of discriminatory conduct by the States, the ADA also forbids significantly more state conduct concerning the disabled than is prohibited by the Fourteenth Amendment. Distinctions drawn by States on the basis of disability are

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[11] *Comm. Print* at 2246 (statement of James W. Ellis, President, American Association on Mental Retardation).

judged for purposes of equal protection analysis by the rational basis test. *Heller* v. *Doe*, 509 U.S. at 319-21; *City of Cleburne*, 473 U.S. at 439-42. The requirements of the ADA, however, effectively raise the level of scrutiny applied to State actions with regard to the disabled to a level well above that required by rational basis review. This is no surprise, because the legislative record makes clear that in enacting the ADA, Congress expressly intended to redefine the substantive Fourteenth Amendment protections provided to the disabled.

Title I of the ADA prohibits employers (including, by its terms, State employers) from discriminating on the basis of disability in hiring, compensation, advancement, training and other "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "Discrimination" as defined by Title I of the ADA includes not only purposeful discrimination, but also the use of "standards, criteria, or methods of administration . . . that have the *effect* of discrimination." 42 U.S.C. § 12112(b)(3)(A)(emphasis added). Title I requires an employer to make a "reasonable accommodation"[12] to the known physical or mental limitations of an applicant or employee unless the employer demonstrates that the accommodation would impose an "undue hardship." 42 U.S.C. § 12112(b)(5)(A); *see* 42 U.S.C. § 12111(10) (defining "undue hardship").[13] Remedies available for violations of

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[12] The ADA defines reasonable accommodations to include, among other things, making alterations to existing physical facilities, offering part-time or modified work schedules, and providing qualified readers or interpreters. 42 U.S.C. § 12111(9)(A),(B).

[13] Title I also limits the extent to which applicants and employees may be subjected to medical examinations, and the uses that may be made of such information. 42 U.S.C. § 12112(d). Title I further prohibits employers from using standards, tests, or other selection criteria "that screen out or tend to screen out an individual with a disability" unless that standard, test, or criteria is shown by the employer "to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6).

Title I of the ADA are the same as those available for violations of Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12117(a).

Title II of the ADA protects the disabled from being discriminated against, or excluded from participation in, services, programs or activities of a public entity. 42 U.S.C. § 12132. A "[q]ualified individual with a disability" under Title II is someone who meets the "essential eligibility requirements" for participation in the public service, program, or activity with or without "reasonable modifications," "the removal of architectural, communication, or transportation barriers," or the "provision of auxiliary aids and services." 42 U.S.C. § 12131. The remedies available for violations of Title II are those provided by Title VI of the Civil Rights Act of 1964.[14]

As even this brief synopsis[15] shows, the ADA prohibits a far broader range of conduct than that prohibited under the rational basis test of the Equal Protection Clause. In *City of Cleburne*, this Court expressly rejected the notion that the disabled constitute a suspect or quasi-suspect class. 473 U.S. at 442-47. Because States "may legitimately take into account [characteristics of the disabled] in a wide range of decisions," the rational basis standard is appropriate to provide States with "the latitude necessary both to pursue policies designed to assist the [disabled] in realizing their full potential, and to freely and efficiently engage in activities that burden the [disabled] in what is essentially an incidental manner." *Id.* at 446. Under the Equal Protection Clause, a

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[14] The ADA itself provides that remedies for violations of Title II are those provided in section 505 of the Rehabilitation Act, 29 U.S.C. § 794a. *See* 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act in turn refers to the remedies provided by Title VI of the Civil Rights Act. 29 U.S.C. § 794a.

[15] Additional explanation of the discrimination prohibited by the ADA is contained in regulations promulgated by the Department of Justice. *See* 28 C.F.R. § 35.101 *et seq.*

classification made by the States on the basis of disability is "presumed to be valid" and will be sustained if it is "rationally related to a legitimate state interest." *Id.* at 440. To show a violation of the Equal Protection Clause, it is insufficient to show that a neutral classification has a disparate impact, instead it is necessary to show intentional discrimination. *See, e.g., Washington* v. *Davis*, 426 U.S. 229 (1976); *Personnel Admin.* v. *Feeney*, 442 U.S. 256 (1979).

In contrast, in an employment context the ADA makes unlawful all "discriminat[ion] against a qualified individual with a disability because of the disability" of that individual, regardless of whether the employer had a rational basis for its actions. 42 U.S.C. § 12112(a); *see Kimel*, 120 S. Ct. at 647 (describing virtually identical provision of ADEA). Moreover, the ADA requires employers to make reasonable accommodations for disabled employees unless the employer can show that such an accommodation would pose an undue hardship. Similarly, under Title II of the ADA, a State may not impose a criteria that "tend[s] to screen out" a qualified disabled individual from a State program, regardless of the rationality of that criteria, unless the State can show that the criteria is necessary for the provision of the program. 28 C.F.R. § 35.130(b)(8). These requirements are backwards of the rational basis scrutiny under the Equal Protection Clause, which presumes State classifications to be proper, and where the burden always remains on the plaintiff to show intentional discrimination. *See Erickson* v. *Board of Governors*, 207 F. 3d 945, 951 (7th Cir. 2000) ("*no one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA") (emphasis in original). In sum, the ADA "through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more State . . . decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647.

Of course, Congress may, in order to deter constitutional violations, prohibit conduct that reaches more broadly than that which actually violates the Constitution. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532 (citing *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980)). But in enacting the ADA, Congress was not faced with conduct by the States evidencing a pattern of violations of the constitutional rights of the disabled. Therefore, the "[s]weeping coverage [of the ADA which] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter" is a means plainly disproportionate to any proper constitutional end. *City of Boerne*, 521 U.S. at 532.

C. By Patterning the ADA on Civil Rights Legislation Concerning Discrimination on the Basis of Race and Gender, Congress Expressly Intended to Heighten the Level of Scrutiny Provided to Classifications on the Basis of Disability

The legislative history of the ADA itself shows that rather than attempting to deter constitutional violations, Congress' goal was to heighten the level of scrutiny applied to decisions affecting the disabled above that provided by the rational basis test. Congress consciously modeled the ADA on earlier civil rights laws dealing with race and gender discrimination, and explicitly provided that discrimination against the disabled under the ADA would be subjected to the same heightened scrutiny.[16] The purpose of the ADA, explained

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[16] *See, e.g., Comm. Print* at 71, 85 (H. Conf. Rep. No. 101-596); *id.* at 100, 123, 142 (S. Rep. No. 101-116); *see also id.* at 2015 ("The Americans with Disabilities Act wisely parallels in the disability area title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination in employment on

the House Judiciary Committee, in rejecting one proposed amendment "antithetical" to that purpose, was "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." [17] While purporting to impose this far-reaching liability on the States for discrimination against the disabled, Congress exempted the federal government from the requirements of the ADA. *See* 42 U.S.C. § 12111(5)(B) (United States specifically excluded from definition of an employer); 42 U.S.C. § 12131 (United States not included in definition of "public entity").[18]

There is accordingly no mystery concerning Congress' intent in enacting the ADA. Rather than attempting to remedy or prevent constitutional violations of the rights of the disabled, Congress explicitly sought to enhance the protections provided the disabled by changing the level of scrutiny this Court had held was applicable to such decisions made by the States. This Congress may not do. *City of Boerne,* 521 U.S. at 535-36; *Kimel*, 120 S. Ct. at 644 ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.").

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the basis of race, color, national origin, sex, or religion.") (statement of Attorney General Thornburgh).

[17] *Comm. Print* at 488-89 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary); *see id.* (adopting another amendment "because it reaffirms the intent of parity between people with disabilities and minorities and women"). According to the House Judiciary Committee, the ADA "completes the circle . . . with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964." *Id.* at 466.

[18] Moreover, the Rehabilitation Act, which prohibits discrimination against the disabled by the federal government, does not authorize awards of compensatory damages in actions against the United States. *Lane* v. *Pena*, 518 U.S. 187 (1996).

II. LITIGATION AGAINST THE STATES ILLUSTRATES THE ADA'S LACK OF CONGRUENCE AND PROPORTIONALITY TO CONSTITUTIONAL STANDARDS

Amici's concern with the reach of the ADA is far from academic. Across the country, States face litigation in federal court in which they must defend, under the ADA, actions with regard to the disabled which are perfectly lawful under the Equal Protection Clause. The cases below show, in concrete terms, the lack of congruence and proportionality between the requirements of the ADA on the one hand, and the requirements of the Constitution on the other. By discussing only several of these cases, it should not be inferred that they are the only ones that offend the sovereign interests of the States. Every suit by a private citizen in federal court against an unconsenting State under the ADA does harm to State sovereignty by forcing the State to spend time and resources to justify actions that should be presumed legal pursuant to applicable constitutional standards and evaluated only under the rational basis test. Every suit brought under the ADA diverts State resources into litigation costs – and damages awards where such damages are awarded – that could instead be used to provide services to the disabled and to other citizens of the State. In addition, litigation under the ADA discourages the States from pursuing initiatives to provide and expand core services to their vulnerable populations, and rewards such efforts with private lawsuits costing millions of dollars.

Amici's interest in defending the structural protections contained in the Constitution must not be confused with a disregard for the rights of the disabled. Activities by the States to protect the rights of their disabled residents were lauded by Congress as examples of what could be done more broadly through the ADA. Today, discrimination against the disabled is prohibited by means of state law which, in every State, protects the disabled from discrimination.[19] In addi-

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19 *See* Appendix A attached listing State laws that protect the rights of the disabled.

tion, any State may, if it chooses, waive its immunity and consent to suit in federal court on claims brought under the ADA. But our constitutional design requires that those decisions be made by the States themselves. And the Constitution further provides that this Court is to be the final arbiter of the substance of the rights protected by the Constitution. Where Congress oversteps those constitutional boundaries, as it has in purporting to hold States liable under the ADA, the States must act to restore the proper Constitutional balance.

A. Hawaii's Good Faith Attempt to Expand Medicaid Coverage to its Needy Uninsured Population Has Resulted in Two Class Action Lawsuits Under the ADA Imposing Liability for Potentially Millions of Dollars, and the Loss of Medical Coverage to Over 30,000 Needy Residents

Hawaii's experience with the ADA illustrates the axiom that "no good deed goes unpunished," while clearly demonstrating the burdens the ADA imposes, and its intrusiveness into areas traditionally reserved to the States. Perhaps nothing is more important to the States than protecting the health and welfare of their residents. In 1993, Hawaii was a pioneer in efforts to determine whether States could provide Medicaid coverage to a broader class of needy citizens while using the same amount of funds. Hawaii sought to provide universal health insurance for its residents by loosening the financial eligibility criteria traditionally applied under Medicaid to serve group of people who could not acquire health insurance on their own, but who had too much income or too many assets to qualify for the traditional Medicaid program. To maintain budget neutrality while covering this larger group of residents, the State of Hawaii decided to provide Medicaid services to some residents through a privatized managed-care model.

The State decided to implement its program, known as QUEST, in two phases. In the initial phase (QUEST Phase I), those of its citizens who were aged, blind, and certified

disabled for purposes of the Social Security Act, would not be moved into managed care through QUEST, but would continue to receive services through the traditional Medicaid fee-for-service program. The State of Hawaii made this decision based on concerns that private insurers would not participate in QUEST if the aged, blind and certified disabled were included, and concerns that some of its disabled residents objected to receiving medical services through managed care. Once the QUEST program was successfully established in its initial phase, the State intended to expand it to cover the aged, blind and certified disabled as well.

The decision by the State of Hawaii to exclude the certified disabled from QUEST Phase I plainly has a rational basis and would be upheld under the standard established by this Court in *Heller* v. *Doe*, *supra*, and *City of Cleburne, supra*. Prior to implementing QUEST Phase I, Hawaii received no complaints concerning any perceived problem with the exclusion of the certified disabled, despite the State's publicization of the program. When the Secretary of the United States Department of Health and Human Services, Donna Shalala, approved QUEST Phase I, the exclusion of the aged, blind and certified disabled from the program was clearly explained.[20]

After QUEST Phase I went into effect, however, a complaint was filed against the State of Hawaii, through its Director of Health and Human Services, alleging that the State's rational decision to exclude the certified disabled from QUEST Phase I violated the ADA, the Rehabilitation Act,

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[20] Hawaii received approval for its QUEST Phase I program from the United States Health Care Financing Administration ("HCFA") and from the United States Department of Health and Human Services. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. 765, 767 (D. Haw. 1996). The approval by DHHS of QUEST Phase I was far from a rubber stamp process. DHHS had twice rejected Oregon's proposed experimental Medicaid project because of perceived ADA violations. *See* Philip G. Peters, Jr., *Health Care Rationing and Disability Rights*, 70 Ind. L.J. 491, 502-05 (1995).

and the Equal Protection Clause. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. at 766. The plaintiffs in *Burns-Vidlak* were ineligible to participate in QUEST Phase I because they were certified disabled, and they failed to qualify for traditional Medicaid fee-for-service coverage because they had assets or income in excess of the Medicaid requirements.[21] The district court granted summary judgment for the plaintiffs, finding that but for their certified disability, they could have received medical assistance through QUEST Phase I. *Id.* at 771.[22] The court held that although the State made a "good faith effort to implement improved and more cost effective health care services through QUEST," the plaintiffs were entitled to recover damages as a result of the "discrimination." *Id.* at 773. The court subsequently determined that the full panoply of remedies was available to plaintiffs, including the potential for punitive damages, *see Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144, 1152 (D. Haw. 1997), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999), certified a class, and found the State liable to the class for damages. At the

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[21] To qualify for traditional Medicaid, individuals had to earn less than 100% of the poverty level and have fewer than $2000 worth of assets. The pilot program, QUEST Phase I, on the other hand, had no asset test, and required that individuals have income less than 300% of the poverty level. *Burns-Vidlak*, 939 F. Supp. at 768.

[22] This is not to say that no disabled individuals, as defined by the ADA, participate in QUEST Phase I, which excluded only the *certified* disabled pursuant to the Social Security Act. *See* 42 U.S.C. § 423(d)(1) (definition of disabled pursuant to the Social Security Act). Because of differences between the definition of disabled in the Social Security Act and that in the ADA, there are likely individuals who are disabled for the purposes of the ADA who participate in QUEST Phase I because they have not been certified disabled by the Social Security Administration or the State of Hawaii. *See generally Cleveland* v. *Policy Management Sys., Corp.*, 526 U.S. 795, 801 (1999) (discussing differences in the definition of disabled between the Social Security Act and the ADA).

district court's instruction, approximately 350 individual plaintiffs filed separate lawsuits to establish class membership and damages. As a result, the State of Hawaii must now defend itself from these numerous claims involving millions of dollars of compensatory claims, millions of dollars in attorney fee requests, and, adding insult to injury, a pending punitive damages claim.[23]

As great as that monetary burden may be, more important to the State of Hawaii is the liability it now faces for its attempt to cure the discrimination found in *Burns-Vidlak.* When faced with the *Burns-Vidlak* complaint, the State of Hawaii correctly anticipated the federal district court's declaration of a violation of the ADA, and moved swiftly to remedy the "violation." By April 1996, the State of Hawaii had amended QUEST Phase I to require all participants to meet the same asset test contained in the traditional fee-for-service Medicaid program. These amendments did not provide the members of the *Burns-Vidlak* class – who were certified disabled residents with assets in excess of that required to obtain traditional Medicaid services – with medical assistance, but instead eliminated coverage for approximately 30,000 Hawaii residents who were not certified disabled who had previously participated in QUEST Phase I, but had too many assets to qualify for traditional Medicaid.

By the time the district court granted summary judgment in *Burns-Vidlak*, the State had already amended the QUEST Phase I regulations. The district court, after hearing from the

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[23] As of June 1, 2000, the State of Hawaii has committed to paying $1,165,958 on these claims, with the claims of several hundred class members yet to be disposed of. The total figure includes $357,612 for compensatory damage claims that have been settled, $305,824 for compensatory damages claims that have been tried and gone to judgment, and $502,522 in costs and fees for the cases that have gone to trial. Appeals of the liability determinations for a number of these individual cases are currently pending before the Court of Appeals for the Ninth Circuit.

plaintiffs on the issue, concluded that QUEST Phase I, as modified, did not deny "coverage for blind or disabled individuals solely on the basis of their disability." 939 F. Supp. at 767. On December 27, 1997, the regulations for QUEST Phase I were again amended, this time to conform the payments required of QUEST Phase I participants with the spend-down requirements contained in the traditional Medicaid fee-for-service program. [24]

Two years after the district court in *Burns-Vidlak* had found the plaintiffs' claims for injunctive relief moot, William Sterling, a member of the *Burns-Vidlak* class, brought a second class action suit. In the *Sterling* case, the district court found the State of Hawaii liable for discrimination because under the April 1996 amended regulations, the certified disabled, who are ineligible for QUEST Phase I, were required through the Medicaid spend-down procedures to pay more for medical assistance than were non-disabled individuals of similar means who participated in QUEST Phase I. *Sterling* v. *Chandler,* No. 98-00258 SOM (D. Haw. Oct. 9, 1998).[25]

The attempt by Hawaii to provide medical assistance to a broader group of residents while using the same amount of Medicaid funds has been essentially defeated by these suits. The group of needy residents to whom Hawaii sought to

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[24] Between April 1996 and December 27, 1997, State regulations required QUEST Phase I participants to pay a fixed monthly premium for services as long as their monthly income was between 100% and 300% of the federal poverty level. The certified disabled, however, were subject to traditional Medicaid rules that required them to "spend down" their income each month to a specified level before receiving coverage. For an explanation of the spend-down provisions of the Medicaid program, see *California Dep't of Health Serv.* v. *United States Dep't of Health & Human Servs.*, 853 F.2d 634, 635-36 (9th Cir. 1988).

[25] An appeal of the *Sterling* decision is currently pending in the Court of Appeals for the Ninth Circuit, with oral argument scheduled for August, 2000.

provide medical assistance lost coverage due to the changes implemented in response to the *Burns-Vidlak* suit. The State of Hawaii has been found liable for money damages for not providing the certified disabled with coverage under QUEST Phase I, even though elimination of the allegedly discriminatory distinctions did not provide the certified disabled with coverage under the program. And in the *Sterling* case, the State faces damages awards for the changes it made to QUEST Phase I *in an attempt to comply with the ADA*, and which were shared by the State with both the federal district court and with counsel for the disabled.

B. The State of Hawaii Was Found Liable for Violating the ADA Through Its Facially Neutral Century Old Animal Quarantine Program

Hawaii is one of the few places in the world which is completely free from rabies. To protect the State from the importation of rabies, the Hawaii Department of Agriculture, pursuant to a law enacted by the State legislature, required a 120-day quarantine on carnivorous animals entering the State. Visually impaired persons who use guide dogs sued the State of Hawaii, through its officials, alleging that Hawaii's quarantine violates the ADA. The Ninth Circuit Court of Appeals agreed and held that the quarantine requirement discriminated against visually-impaired individuals in violation of the ADA. *Crowder* v. *Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). Rather than invalidating the quarantine requirement, however, the Court of Appeals remanded for a determination of whether plaintiffs' proposed modifications to Hawaii's quarantine were "reasonable modifications" which should be implemented, or "fundamental alterations" which could be rejected by the State. *Id.* at 1485-86. Rather than face the intrusive review required on remand, the State of Hawaii settled the litigation.

There can be no dispute that the State of Hawaii had a rational basis for its quarantine requirement, which applied in a facially neutral manner and was not intended to discrimi-

nate against, or otherwise burden, the disabled. Nevertheless, the State was held liable for violating the ADA for this program and was subject to review by a federal district court that would dictate the details of a quarantine program that was central to the State's ability to protect the health of its residents.

C. The State of Ohio Has Been Burdened With Repayment of $2.5 Million in Nominal Fees Charged to Obtain Handicapped Parking Placards

As part of its federally-mandated program to provide handicapped parking spaces, the State of Ohio permits its disabled residents to obtain handicapped windshield placards to be placed in a car. In order to cover the costs of the placard program, the State of Ohio charged a nominal fee of $5.00 to those disabled residents who wished to purchase a permanent placard. Over a period of about six years, the State collected approximately $2.5 million in fees through this provision. *Thorpe* v. *Ohio*, 19 F. Supp. 2d 816, 818-19 (S.D. Ohio 1998).

A class of Ohio residents and organizations that had paid the fee sued State officials alleging that the fee violated a regulation promulgated under the ADA that prohibits a "surcharge" necessary to "cover the costs of measures . . . that are required to provide [the disabled] with the nondiscriminatory treatment required by the Act." 28 C.F.R. § 35.130(f). The district court, rejecting the State's claim of Eleventh Amendment immunity, held that the surcharge violated the ADA. In addition to an injunction invalidating the fee, the court ordered the State to return to the plaintiff class the $2.5 million it had collected in fees. 19 F. Supp. 2d at 826.

This nominal charge by the State of Ohio would most certainly pass muster under rational basis scrutiny if challenged under the Equal Protection Clause. Yet, Ohio and other states across the country face liability under the ADA

for imposing such nominal charges on the disabled to recover the costs of providing placards.[26]

D. The State of New York Was Held Liable for $300,000 in Damages for "Retaliating" Against a State Employee Who Was Not Even Adjudged Disabled

The State of New York has been found liable for the maximum amount of damages available under Title I of the ADA for actions taken with regard to an employee of the state prison system who was not even disabled pursuant to the definition of the ADA. In *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999), a correctional officer, who developed respiratory difficulties after being hired by the State, alleged that he was discriminated against on the basis of a disability when the State was unable to promise him a smoke-free work environment. The plaintiff repeatedly chose to schedule himself for shifts which required him to work in parts of the prison where smoking was allowed. The jury awarded the plaintiff a total of $420,300 in damages, which included $285,000 for pain, suffering and mental anguish. *Id.* at 306. The award was capped by the district court at $300,000 pursuant to 42 U.S.C. § 1981a(b)(3)(D). *Id.* at 307.

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[26] Other States have similarly faced litigation under the ADA invalidating nominal fees paid for handicapped parking placards. *See, e.g., Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. pending* (No. 99-1417) ($6 biennial fee); *McGarry* v. *Director, Dep't of Revenue*, 7 F. Supp. 2d 1022 (W.D. Mo. 1998) ($2 fee); *Duprey* v. *Connecticut*, 28 F. Supp. 2d 702 (D. Conn. 1998) ($5 fee). On the other hand, in *Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. pending* (No. 99-424), the Court of the Appeals for the Fourth Circuit held that Congress had failed to properly abrogate the Eleventh Amendment immunity of the State with regard to this regulation because the regulation was substantive rather than remedial and therefore beyond Congress' power under Section 5 of the Fourteenth Amendment. *Id.* at 707.

On appeal, the Court of Appeals held that there was insufficient evidence from which the jury could conclude that the plaintiff was disabled under the ADA. 187 F.3d at 313, 314. The Court of Appeals nonetheless affirmed the jury award on the basis that it could be justified by the jury's separate finding that the defendants had retaliated against the plaintiff for invoking his rights under the ADA.

Thus, the State was found liable for $300,000 in damages for actions taken with regard to an individual who wasn't disabled at all. In addition, pursuant to this Court's decision in *Cleburne*, the State undoubtedly would be allowed to make rules of general applicability that had an incidental effect on disabled State employees – here a rule that prison employees must be available to patrol all areas of the facility – without being held liable under the Equal Protection clause.

* * *

While the *Amici* States maintain that the ADA does not properly abrogate their immunity from suit for money damages in federal court, they do not wish through this brief to signal that they have lessened their commitment to protecting their disabled residents from discrimination. To the contrary, *Amici* States intend to continue their commitment to protecting the rights of the disabled through the provisions of State law. In addition, any State that wishes to make the protections of the ADA available to its residents through the availability of money damages actions in federal court may waive its immunity from such suits. But under this Court's decisions, Congress simply lacks the authority to abrogate the States' immunity under the ADA.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX A

STATE LAWS PROTECTING THE DISABLED FROM DISCRIMINATION

Alabama	Ala. Code §§ 21-4-1 *et seq.*, 21-7-1 *et seq.*, 24-8-1 *et seq.*
Alaska	Alaska Stat. §§ 18.80.200 *et seq.*, 39.25.160, 47.80.010 *et seq.*
Arizona	Ariz. Rev. Stat. §§ 41-1461 *et seq.*, 41-1491 *et seq.*, 41-1492 *et seq.*
Arkansas	Ark. Code Ann. §§ 16-123-101 *et seq.*, 16-123-201 *et seq.*, 20-76-202
California	Cal. Civ. Code §§ 51, 51.5, 52, 54 *et seq.*; Cal. Gov't Code §§ 11135 *et seq.*, 12920 *et seq.*, 12940, 12955 *et seq.*
Colorado	Colo. Rev. Stat. §§ 24-34-401 *et seq.*, 24-34-501 *et seq.*, 24-304-601 *et seq.*, 27-10.5-101 *et seq.*
Connecticut	Conn. Gen. Stat. § 46a-60, 46a-64, 46a-64c, 46a-70, 46a-71
Delaware	Del. Code Ann. tit. 6, §§ 4500 *et seq.*, 4600 *et seq.*; Del. Code Ann. tit. 19, § 720 *et seq.*; Del. Code Ann. tit. 25, § 5116
Florida	Fla. Stat. Ann. §§ 110.233, 112.042, 413.08, 760.01 *et seq.*, 760.20 *et seq.*

Georgia	Ga. Code Ann. §§ 8-3-200 *et seq.*, 30-1-1 *et seq.*, 30-3-1 *et seq.*, 34-6A-1 *et seq.*, 43-40-25, 45-19-20 *et seq.*
Hawaii	Haw. Rev. Stat. §§ 76-1, 78-2, 347-1 *et seq.*, 368-1 *et seq.*, 378-1 *et seq.*, 489-1 *et seq.*, 515-1 *et seq.*
Idaho	Idaho Code §§ 56-701 *et seq.*, 67-5901 *et seq.*
Illinois	775 Ill. Comp. Stat. § 5/1-101 *et seq.*
Indiana	Ind. Code §§ 22-9-1-1 *et seq.*, 22-9-5-1 *et seq.*, 22-9.5-1-1 *et seq.*, 22-9-6-1 *et seq.*
Iowa	Iowa Code §§ 216.1 *et seq.*, 216C.1 *et seq.*
Kansas	Kan. Stat. Ann. §§ 44-1001 *et seq.*, 44-1015 *et seq.*, 58-1301 *et seq.*
Kentucky	Ky. Rev. Stat. Ann. § 344.010 *et seq.*
Louisiana	La. Rev. Stat. Ann. §§ 23:322 *et seq.*, 46:2251 *et seq.*, 49:145 *et seq.*, 51:2231 *et seq.*
Maine	Me. Rev. Stat. Ann. tit. 5, §§ 781 *et seq.*, 4551 *et seq.*, 7051 *et seq.*
Maryland	Md. Ann. Code art. 49B, § 1 *et seq.*; Md. Code Ann., State Pers. & Pens. § 2-302
Massachusetts	Mass. Gen. Laws ch. 151B, § 1 *et seq.*; Mass. Gen. Laws ch. 272, §§ 92A, 98

Michigan	Mich. Comp. Laws § 37.1101 *et seq.*
Minnesota	Minn. Stat. § 363.01 *et seq.*
Mississippi	Miss. Code Ann. §§ 25-9-149, 43-6-1 *et seq.*, 43-6-101 *et seq.*, 43-33-723
Missouri	Mo. Rev. Stat. § 213.010 *et seq.*
Montana	Mont. Code Ann. §§ 49-1-102, 49-2-301 *et seq.*, 49-3-201 *et seq.*, 49-4-101 *et seq.*
Nebraska	Neb. Rev. Stat. §§ 20-126 *et seq.*, 20-301 *et seq.*, 48-1101 *et seq.*
Nevada	Nev. Rev. Stat. §§ 118.010 *et seq.*, 281.270, 613.310 *et seq.*, 651.050 *et seq.*
New Hampshire	N.H. Rev. Stat. Ann. § 354-A:1 *et seq.*
New Jersey	N.J. Stat. Ann. § 10:5-1 *et seq.*
New Mexico	N.M. Stat. Ann. §§ 28-1-1 *et seq.*, 28-7-1 *et seq.*
New York	N.Y. Exec. Law § 290 *et seq.*
North Carolina	N.C. Gen. Stat. §§ 41A-1 *et seq.*, 126-16 *et seq.*, 168-1 *et seq.*, 168A-1 *et seq.*
North Dakota	N.D. Cent. Code §§ 14-02.4-01 *et seq.*, 14-02.5-01 *et seq.*
Ohio	Ohio Rev. Code Ann. § 4112.01 *et seq.*
Oklahoma	Okla. Stat. tit. 25, § 1101 *et seq.*

Oregon	Or. Rev. Stat. §§ 659.400 *et seq.*, 659.436 *et seq.*
Pennsylvania	Pa. Stat. Ann. tit. 43, § 951 *et seq.*
Rhode Island	R.I. Gen. Laws §§ 28-5-1 *et seq.*, 34-37-1 *et seq.*, 42-87-1 *et seq.*, 42-112-1 *et seq.*
South Carolina	S.C. Code Ann. §§ 1-13-10 *et seq.*, 31-21-10 *et seq.*, 43-33-10 *et seq.*, 43-33-510 *et seq.*
South Dakota	S.D. Codified Laws § 20-13-1 *et seq.*
Tennessee	Tenn. Code Ann. §§ 4-21-601 *et seq.*, 5-23-104, 8-50-103, 68-14-601 *et seq.*, 68-120-201 *et seq.*
Texas	Tex. Hum. Res. Code Ann. § 121.001 *et seq.*; Tex. Lab. Code Ann. § 21.001 *et seq.*; Tex. Prop. Code Ann. § 301.001 *et seq.*
Utah	Utah Code Ann. §§ 26-30-1 *et seq.*, 34A-5-101 *et seq.*, 57-21-1 *et seq.*
Vermont	Vt. Stat. Ann. tit. 3, §§ 961 *et seq.*, 1026 *et seq.*; Vt. Stat. Ann. tit. 9, §§ 4500 *et seq.*; Vt. Stat. Ann. tit. 21, §§ 495 *et seq.*, 1621 *et seq.*, 1721 *et seq.*
Virginia	Va. Code Ann. §§ 2.1-714 *et seq.*, 36-96.1 *et seq.*, 51.5-1 *et seq.*
Washington	Wash. Rev. Code § 49.60.010 *et seq.*

West Virginia	W. Va. Code §§ 5-11-1 *et seq.*, 5-11A-1 *et seq.*
Wisconsin	Wis. Stat. §§ 106.50, 106.52, 111.31 *et seq.*, 230.18
Wyoming	Wyo. Stat. Ann. §§ 27-9-101 *et seq.*, 35-13-201 *et seq.*